In the Supreme Court of the United States

No. 76-86

McCLATCHY NEWSPAPERS, a corporation; ELEANOR McCLATCHY; C. K. McCLATCHY; BYRON CONKLIN; and CARLO BUA,

Petitioners,

vs.

WILLARD M. NOBLE and ETTA M. NOBLE,

Respondents.

Petitioners' Reply Brief

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INDEX OF AUTHORITIES

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The significant fact about respondents' brief in opposition[1] is that (1) it does not contest that the questions proferred by the petition are present, (2) it does not deny that they are important, and (3) it does not attempt to support the answers given to those questions by the Court of Appeals. Instead it seeks to deflect attention from the questions, essentially by three contentions.[2]

The first contention is that the petition is "premature," because the new trial ordered by the court below has not yet occurred (R. Br. p. 11). But that was the posture in *Gulf Oil Corporation*

1. Hereafter referred to as "R. Br.".

2. Other contentions have already been dealt with in our petition and we therefore do not discuss them here.

v. Copp Paving Company, 419 U.S. 186 (1974) and numerous other cases[3] where the Court has granted certiorari. Not only are the issues "fundamental to the further conduct of the case", but, more important, the situation is not one where the questions presented by the petition are of concern to this case alone. Here the Court of Appeals has announced erroneous rules of antitrust law of widespread application, and the whole justification of certiorari jurisdiction is to review questions of such magnitude. Should this Court not intervene, the opinion below will remain in the books; each of the fourteen district courts in the Ninth Circuit will be required, in other antitrust cases, to instruct in conformity with that decision; and all the courts in other circuits will be implored to do so. It can not be "premature" to give guidance to those district courts and to avoid numerous protracted trials of antitrust cases on the instructions mandated by the Court of Appeals.

In a similar vein, respondents suggest that the Court not reach the important questions raised by the petition, because, so they argue, there is an "alternative" ground on which the judgment below can be sustained. If there are other grounds upon which to reach the same judgment, they can be presented to the court below for its consideration on remand. No such grounds were stated by that court or appear in its opinion, and the problem now is to sweep out of the books the incorrect reasoning on which it proceeded lest it infect jurisprudence.

Finally, respondents make the inexplicable assertion that the interstate commerce issue was not raised below (R. Br. p. 14). By judicial decision the words, "in restraint of trade or commerce" of Section 1 of the Sherman Act have the double meaning of restraint *in* commerce and restraint *affecting* commerce. The trial

3. *E.g., U.S. v. General Motors Corp.,* 323 U.S. 373, 377 (1945); *Land v. Dollar,* 330 U.S. 731, 734, n. 2 (1947); *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 685, n. 3 (1949); *Gillespie v. U.S. Steel Corp.,* 379 U.S. 148, 153 (1964).

court instructed the jury that it could not return a verdict for plaintiffs unless it found that "an unreasonable restraint of interstate commerce would have resulted." The court below held this to be erroneous because the restraint was a *per se* one and therefore an effect on commerce was presumed. It held that the trial court also erred in declining to instruct the jury that "it is unnecessary for plaintiffs to prove that there has been a restraint of interstate trade and commerce as the result of such restriction—it is presumed" (See petition, p. 6). Thus the trial court was reversed because it did not instruct the jury that plaintiff need not prove *either* that the restraint was *in* commerce or that it *affected* commerce. This was the very issue briefed and argued.

In their opening brief below, respondents, there appellants, stated, as the very first "issue presented for review" (at pp. 1-2):

> "1. Did the trial court commit reversible error when it instructed the jury on plaintiffs' second claim pertaining to vertically imposed territorial restrictions upon the resale of a product by a manufacturer after it had parted with ownership of the product, that it was the duty of the jury to determine whether such restrictions result in an unreasonable restraint of interstate trade and commerce and refused to give plaintiffs' instructions that such restrictions constitute a *per se* violation of Section 1 of the Sherman Act and are presumed to be an unreasonable restraint of interstate trade and commerce?"

The same brief collected the instructions given by the trial court (App. B.),[4] and argued (p. 22) that they "did not conform to the status of the law . . . and that the trial court should have given plaintiffs' instructions that such restrictions constitute a *per se* violation . . . *and are presumed to be an unreasonable restraint of trade and commerce.*" (Emphasis supplied). Appendix

4. One of which included this:
"The first question is whether there is any restraint on interstate commerce."

C to the same brief assembled the rejected instructions, including those appearing at pages 39-40 of the appendix to our petition for certiorari. Among these was the proposed instruction reading:

> "Because a vertically imposed restriction upon the resale of a product by a manufacturer after it has parted with ownership of it is a *per se* violation of Section 1 of the Sherman Act it is unnecessary for plaintiffs to prove that there has been a restraint of interstate trade and commerce as a result of such restriction—it is presumed."

Petitioners in their brief below responded to these arguments and submitted that the trial court was "dead right" in giving respondents' instructions and in refusing the "presumed restraint" instruction urged by respondents.[5]

CONCLUSION

We respectfuly submit that the petition for certiorari should be granted.

Dated: San Francisco, California, October 1, 1976

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5. Under the heading "There was No Restraint of, or Affecting Interstate Commerce", petitioners' opening sentence in their brief below was:

> "The business of distributing the Sacramento Bee newspaper in a twenty-mile area around Sacramento was not in interstate commerce [citations] and it had no effect of any kind on commerce."